



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Precise Construction Management

File: B-277872

Date: December 4, 1997

Yogen Dalal for the protester.

Christopher M. Bellomy, Esq., and V. Paul Clay, Esq., Naval Facilities Engineering Command, for the agency.

Scott Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly found bid nonresponsive is denied where bidder failed to acknowledge a material amendment; post-bid opening evidence showing intent to comply with the terms of the amendment cannot serve to cure an otherwise nonresponsive bid.

DECISION

Precise Construction Management protests the actions of the Department of the Navy in connection with invitation for bids (IFB) No. N63387-96-B-4582, issued for construction and landscaping work in San Diego, California. Precise maintains that the agency improperly failed to provide it with a copy of amendment No. 1 to the IFB and improperly rejected its bid as nonresponsive.

We deny the protest.

The IFB called for fixed-price bids to perform construction and landscaping work at the Navy's Murphy Canyon Housing facility. As part of the landscaping work, the IFB called for the installation of a sprinkler system and specified that certain equipment components were to be manufactured by a firm known as Calsense. As originally issued, the IFB also incorporated Federal Acquisition Regulation (FAR) § 52.236-5, which provides that references to equipment by trade name or model number shall be regarded as establishing a standard of quality rather than as establishing a requirement for a particular manufacturer's equipment. Because the Navy wanted only Calsense equipment, however, it issued amendment No. 1 to clarify the solicitation. The amendment provided that, notwithstanding any other provision of the IFB, only Calsense irrigation equipment was acceptable.¹

¹The amendment also made several other minor changes that for purposes of this protest are irrelevant.

The Navy experienced difficulties in disseminating the amendment, in part, because the activity distributing the original solicitation was different from the activity distributing the amendment. The activity distributing the IFB kept a bidders list which was updated periodically and should have included all firms that had obtained copies of the solicitation. The bidders list used to distribute the amendment, however, did not include all firms that had obtained copies of the IFB, apparently because it had not been completely updated when it was forwarded to the activity distributing the amendment. As a consequence, a total of nine bidders, including the protester, did not receive the amendment.

At bid opening, five bids were received with Precise submitting the apparent low bid. Upon review of the bids, the agency found that Precise had not acknowledged the amendment. Shortly after bid opening, Precise obtained and reviewed a copy of the amendment and advised the agency by letter that it had intended to furnish the Calsense equipment and that its price therefore remained unchanged. The Navy nonetheless advised Precise that its bid was nonresponsive because of the firm's failure to acknowledge the amendment.

The agency now concedes that its procedures for distributing the amendment were inadequate to ensure receipt by all prospective bidders, and it therefore intends to cancel and reissue the IFB.² However, Precise maintains that it instead should receive award based on its low price under the original IFB, because it has shown through evidence furnished after bid opening--specifically, a letter from its sprinkler system subcontractor--that it at all times intended to furnish the Calsense equipment. It remains the agency's position that Precise's bid is nonresponsive and that Precise therefore is ineligible for award under the original IFB.

Precise's bid was properly found nonresponsive. A bidder's failure to acknowledge a material amendment renders the bid nonresponsive since, absent such acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to comply with the requirements of the amendment. ABC Project Management, Inc., B-274796.2, Feb. 14, 1997, 97-1 CPD ¶ 74 at 2. An amendment is material where it has more than a negligible effect on price quantity, quality, or delivery. FAR § 14.405. Moreover, a bidder may not properly acknowledge an amendment after bid opening, since this unfairly would allow the firm to decide after bid opening whether or not to render itself ineligible for award. ABC Project Management, Inc., supra, at 2-3.

The amendment here clearly was material since it directly affected the bidders' legal obligation to furnish Calsense--as opposed to any other type of-irrigation

²Because the agency has conceded error regarding the faulty distribution of the amendment and is resoliciting, the protester's challenge to the agency's failure to send it the amendment is academic and need not be addressed here.

equipment. The amendment thus bears directly on quality, and Precise's bid was nonresponsive because, Precise's claim notwithstanding, it simply did not legally obligate the firm to furnish the Calsense equipment. Precise does not maintain that the amendment is not material, but only that its post-bid opening information shows that it intends to furnish Calsense equipment. This information cannot serve to cure the defect in its bid, however, since it was submitted after bid opening. ABC Project Management, Inc., supra, at 3. The agency therefore properly rejected Precise's bid and the firm is not eligible for award under the original IFB. Under these circumstances, the proposed cancellation of the IFB and resolicitation of the requirement is proper.

The protest is denied.

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